29405 SERVICE DATE - DECEMBER 2, 1998
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-477 (Sub-No. 3X)

OWENSVILLE TERMINAL COMPANY, INC.--ABANDONMENT EXEMPTION--
IN EDWARDS AND WHITE COUNTIES, IL, AND
GIBSON AND POSEY COUNTIES, IN

Decided: November 24, 1998

This decision denies a petition for reconsideration and reopening of a Board decision served February 25, 1998, filed by persons owning land underlying a rail line between Browns, IL, and Poseyville, IN.

BACKGROUND

On November 7, 1997, Owensville Terminal Company, Inc. (OTC) filed a petition for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Browns—Poseyville Line, between milepost 205.0 at or near Browns, IL, and milepost 227.5 near Poseyville, IN, a distance of 22.5 miles in Edwards and White Counties, IL, and Gibson and Posey Counties, IN. Pursuant to 49 U.S.C. 10502(b) and 49 CFR 1152.60, the Board published a notice in the Federal Register (62 FR 63418-19) on November 28, 1997, instituting an exemption proceeding. On December 5, 1997, Indiana Trails Fund, Inc. (Indiana Trails) filed a request for issuance of a notice of interim trail use (NITU) under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29 and for imposition of a public use condition pursuant to 49 U.S.C. 10905. A request for a public use condition was also filed by the Indiana Department of Transportation (INDOT) on December 30, 1997.[1]

In a decision and notice of interim trail use or abandonment served February 25, 1998, the Board granted the sought exemption, subject to trail use, public use, historic preservation, environmental, and employee protective conditions.

On March 30, 1998, 19 persons who allegedly own land underlying the Browns—Poseyville Line right-of-way (hereafter landowners or petitioners) jointly filed a petition for reconsideration and reopening. On April 15, 1998, the landowners filed nine affidavits that they had inadvertently failed to append to their petition. OTC replied to the petition on April 20, 1998. On May 12, 1998, Margaret Marriott, another person who allegedly owns land underlying the right-of-way, filed a

[1] INDOT's request was late-filed but was accepted because it did not delay the proceeding.

petition for leave to intervene in support of the landowners' petition. On June 4, 1998, Indiana Trails replied to Ms. Marriott's petition.

Also filed with the Board were six letters from interested landowners other than the above joint-filing landowners.[2] Although three of the letters indicate that a copy was sent to counsel for OTC, and one of the three indicates, in addition, that copies were sent to Indiana Trails and other persons, none of the letters contains a certificate of service. We nevertheless will consider the letters. They raise only issues that were also raised in pleadings properly filed. In view of our findings below, no parties will be prejudiced by our consideration of the arguments made in the letters.[3]

PRELIMINARY MATTERS

Noting that the February 25 decision stated that petitions to reopen must be filed by March 23, 1998, the landowners request that the Board accept their petition, which was filed one week late. The landowners assert that they did not become aware of the Board's decision until after March 23. OTC responds that no good cause has been shown for accepting the landowners' late filing.

Under our rules of appellate procedure at 49 CFR 1115.4, a petition to reopen an administratively final action on grounds of material error may be filed at any time. In addition, the Board's rules do not specify any time limits for the filing of petitions to revoke exemptions granted under 49 U.S.C. 10502 and 49 CFR 1152.60. The landowners request reopening on grounds of material error, and they seek revocation of OTC's abandonment exemption as part of their relief. Further, there is no evidence that the timing of the filing has prejudiced any parties. In light of these facts, the landowners' pleading will be accepted for filing.

Ms. Marriott seeks leave to intervene in support of the landowners. She asserts that, while she has an interest in the proceeding similar to that of the landowners, her position on the issues differs sufficiently to require the filing of a separate pleading. Indiana Trails opposes her intervention. It argues that Ms. Marriott's pleading amounts to a new petition to reopen which, having been filed 6 weeks after the landowners' petition, is "vastly out of time."

We will grant Ms. Marriott intervention and consider her pleading. Ms. Marriott's pleading can be viewed as both a request to reopen an administratively final proceeding and one to revoke an exemption, and no parties will be prejudiced by our considering her arguments.

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[2] Charles Siegert, on February 25, 1998; Chester and Mary Jean Siegert, also on February 25, 1998; Marvin Wiseman, on February 27, 1998; Margaret Marriott, on March 2, 1998; and Allen E. Wiseman, on June 25 and October 28, 1998.

[3] Persons interested in participating in proceedings before the Board should consult our Office of Congressional and Public Services for assistance in preparing pleadings in compliance with our rules at 49 CFR part 1104.

POSITIONS OF THE PARTIES

The landowners argue that the Board committed "errors of law" in its February 25 decision. First, they assert that the Board erred in granting an exemption on the record in this proceeding. The landowners maintain that the Board's class exemption procedures set forth at 49 CFR 1152.50, which require, in part, that a carrier certify that no local traffic has moved over the subject line for at least 2 years, supersede the general statutory language of 49 U.S.C. 10502, which, in part, requires a finding that regulation of the abandonment is not necessary to carry out the rail transportation policy at 49 U.S.C. 10101 (RTP). The landowners assert that OTC has not owned the line long enough to qualify for abandonment under section 1152.50 and, moreover, that trains have been operating on the line within the past 2 years.

Moreover, the landowners argue, even if section 10502 can be interpreted to permit an exemption that does not meet the requirements of section 1152.50, the statutory standards nevertheless have not been met because an exemption would be contrary to the RTP. In support of this argument, the landowners cite section 10101(2), which requires "fair and expeditious regulatory decisions when regulation is required." The landowners also state that they believe that the Board's procedures are unfair, arbitrary and capricious because they assertedly do not provide for any notice that a proceeding might be forthcoming or that a decision has been reached. Petitioners also assert that these procedures, by allowing OTC and Indiana Trails to convert petitioners' right-of-way land to a non-railroad purpose, deny the latter due process of law, and unlawfully deprive them of their reversionary rights.

The landowners also argue that the Board erred in simultaneously imposing a public use condition and issuing a NITU.[4] The landowners assert that a public use condition and a NITU are mutually inconsistent and cannot be applied at the same time.[5] In essence, petitioners argue that, whereas under public use conditions property is transferred in the context of consummation after an abandonment is authorized, under a NITU full abandonment does not occur and the status of the right-of-way as property used for railroad purposes is preserved. The landowners assert also that the practice of imposing a public use condition and issuing a NITU simultaneously allows circumvention of the statutory 180-day limit on public use conditions, as the Board routinely grants extensions to trail use negotiating periods. Petitioners complain that this practice allows a trail use requester to obtain the benefits of public use conditions to preserve the right-of-way.

OTC replies that, in arguing that the record does not support a grant of an exemption, the

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[4] The landowners also contend that the February 25 decision did not, in fact constitute a NITU. This argument has no merit and does not warrant discussion.

[5] In support, they cite Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied, 516 U.S. 1171 (1996) (Fritsch). Because Fritsch did not, in fact, involve the simultaneous issuance of public use and trail use conditions, that case is inapplicable.

landowners fail to understand that there are two separate processes for obtaining abandonment exemption authority under 49 U.S.C. 10502: notices of exemption filed under the class exemption rules at section 1152.50, and individual petitions for exemption filed under 49 CFR 1152.60 and part 1121. OTC explains that, when a railroad files an individual petition for exemption under the latter regulations, there is no requirement that the line has been out of service, and the Board considers the petition under the exemption criteria of section 10502(a), as it did here. OTC also disputes the landowners' claim that they were not afforded proper notice of the abandonment exemption proceeding. The railroad indicates that it published notice of its petition in newspapers of general circulation in the four involved counties, as required by the Board's rules at 49 CFR 1152.12(c), and that the Board published notice of OTC's filing in the Federal Register as required by section 1152.60. OTC emphasizes that the Board's procedures provide adequate notice and that both the Board and the ICC considered and rejected arguments that adjoining landowners should be given "specific" notice of abandonment application or exemption proceedings that might affect them. See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537, ___S.T.B. ___ (STB served Dec. 24, 1996, and June 18, 1997) (Aband. and Discontinuance), aff'd, National Ass'n of Reversionary Property Owners v. Surface Transportation Board, No. 97-1516 (D.C. Cir. Sept. 22, 1998) (NARPO).

OTC replies also that there is nothing unlawful about the simultaneous imposition of a public use condition and the issuance of a NITU. The railroad asserts that, contrary to the landowners' contention, both public use and trail use conditions are imposed only after abandonment is authorized or exempted and before abandonment is consummated. Finally, OTC disputes the landowners' contention that the practice of simultaneously imposing public use and trail use conditions enables a potential trail user to obtain the benefit of a public use condition beyond 180 days by requesting an extension of the trail use negotiating period. OTC points out that a public use condition cannot be extended beyond the 180-day statutory limit, see 49 U.S.C. 10905, and that extension of a trail use negotiating period does not revive any of the benefits of a public use condition. OTC adds that the landowners' argument is moot in any event, as the subject right-of-way is being conveyed pursuant to a trail use condition.[6]

Ms. Marriott contends that the Board's procedures failed to give her actual notice of, and an opportunity to intervene and participate in, proceedings and negotiations that could result in the taking of her property. The result, she asserts, is that she is deprived of due process of law.

Ms. Marriott, a California resident, asserts that publication of notice in "local" newspapers does not reach landowners who do not have access to those newspapers. The Board's Federal Register notice, she asserts, does not sufficiently specify the location of the abandonment or identify the individuals or class of persons who would be affected by it. Further, Ms. Marriott argues, even

[6] By a letter filed August 3, 1998, Indiana Trails has notified the Board that it has purchased the 22.5-mile line for interim trail use subject to the Trails Act and our implementing regulations.

had personalized individual notice been given here, it would not have put her on notice that the proceedings before the Board could result in the loss of her property. To the contrary, she avers, notice of an abandonment proceeding is an indication that the landowner's property will no longer be used for railroad purposes and that the landowner may expect that an easement for railroad use is about to terminate. Ms. Marriott complains also that landowners do not receive adequate notice of actions the Board takes during the 180-day trail use negotiation period or during extensions of those periods.

Ms. Marriott contends, further, that due process requires that she be permitted to participate in proceedings during Trails Act negotiation periods, and that the Board's procedures arbitrarily exclude her from doing so. Ms. Marriott asserts that she has the right to monitor, as a participant, the integrity of negotiations and the trail implementation process. She complains that Board regulations terminate a landowner's right to intervene and participate before reasons to challenge the trail use process might even arise. She complains further that a landowner has no way of providing the Board with information about the activities of an abandoning railroad and a trail use group, or of informing the Board of any fraudulent activities.

Indiana Trails replies that the Board and its predecessor agency have found that actual notice to landowners is not feasible or warranted and that the agency's notice regulations provide adequate notice to all interested parties of proposed abandonments and the possibility that a right-of-way approved for abandonment may be used as a trail under 16 U.S.C. 1247(d). See Aband. and Discontinuance; NARPO. Indiana Trails adds that Ms. Marriott had actual notice of the Board's decision in this proceeding in time to file a timely petition for reconsideration; in support, it notes that Ms. Marriott filed a letter regarding the proceeding on February 27, 1998, two days after service of the Board's decision granting the exemption.

The persons who submitted letters in this proceeding raise issues of notice, transferability of property interests, and feasibility of a trail on the right-of-way. In the latter area, the letter writers express concerns regarding maintenance of the property, safety of trail users, and protection of persons whose property adjoins the trail.

DISCUSSION AND CONCLUSIONS

Under both 49 CFR 1115.3, which governs petitions for reconsideration, and 49 CFR 1115.4, which governs petitions to reopen administratively final actions, it is incumbent upon a petitioner to show material error, new evidence, or substantially changed circumstances. As previously noted, in this case the landowners and Ms. Marriott contend that the Board has committed material error.

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation is necessary to carry out the RTP. As previously noted, the landowners seek revocation, and Ms. Marriott's petition can be viewed as seeking that same relief. Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted.

I&M Rail Link, LLC--Acquisition and Operation Exemption--Soo Line Railroad Company, STB Finance Docket No. 33326 (STB served Apr. 2, 1997); Minnesota Commercial Ry., Inc.--Trackage Rights Exemption--Burlington Northern Railway Company, 8 I.C.C.2d 31, 35 (1991); and Wisconsin Central, Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 8, 1988). The party seeking revocation has the burden of proving that regulation of the transaction is necessary.

Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if exemption is proper at the outset of a proceeding, i.e., whether regulation of the transaction is necessary to carry out the RTP. This analysis focuses on the sections of the RTP related to the underlying statutory section from which exemption is sought. See Missouri Pac. R. Co.--Aban. Exempt.--Counties in Oklahoma, 9 I.C.C.2d 18, 25 (1992); Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991), cert. denied, 111 S. Ct. 868 (1992).

As next discussed, petitioners have failed to establish either that our prior action involved material error or that regulation of the transaction is necessary to carry out the RTP. Accordingly, we will not reconsider or reopen our prior decision, nor will we revoke the abandonment exemption granted in that decision.

The landowners argue that the Board materially erred in finding that the record supports a grant of an exemption and in simultaneously imposing a public use condition and issuing a NITU. Neither of these claims has merit. As OTC notes, OTC did not file a notice of exemption under the Board's class exemption regulations at 49 CFR 1152.50, which govern abandonment of rail lines that have been out of service for at least 2 years. Thus, it is not relevant that OTC might not have owned the subject line for 2 years or that some traffic moved over the line during that period. Rather, OTC's petition for an individual exemption was filed under 49 CFR 1152.60 and part 1121 and was processed accordingly. Petitioners have failed to demonstrate that we erred in concluding that regulation of this transaction is not necessary to carry out the RTP.

The landowners' second argument also lacks merit. The Board frequently grants abandonment authority subject to both trail use and public use conditions. See, e.g., Paducah & Louisville Railway, Inc.--Abandonment Exemption--In Muhlenberg County, KY, STB Docket No. AB-468 (Sub-No. 3X) (STB served Aug. 21, 1998), and Union Pacific Railroad Company--Abandonment and Discontinuance of Service Exemption--In Warren County, IA, STB Docket No. AB-33 (Sub-No. 120X) (STB served July 15, 1998). See also our rules at 49 CFR 1121.4(g). Contrary to the landowners' assertions, this is not inappropriate. Both public use and trail use conditions are imposed only after abandonment is authorized or exempted and before it is consummated. As discussed in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598-99 (1986), when both conditions are imposed, the railroad and the party seeking to acquire the right-of-way may choose to transfer the property under either condition, depending on the quality of the rail carrier's title. The Board has not been apprised of any problems encountered as a result of this approach. The simultaneous issuance of a NITU and a public use condition does not extend the 180-day statutory limit on public use conditions. After the 180-day period expires, so does the

public use condition. Thereafter, negotiation by the railroad is purely voluntary pursuant to a NITU.

The landowners and Ms. Marriott assert that Board procedures do not afford adequate notice of abandonment proceedings and trail use requests and thus are unfair. Ms. Marriott also advances "due process" arguments relating to the trail use negotiation process. It is unclear how these arguments relate to the criteria for reconsideration, reopening, or revocation; rather, they appear to amount to collateral attacks on our established rules of procedure. Nevertheless, we will deem petitioners' arguments as constituting allegations of material error and will address them.

As OTC correctly states, the Board recently declined to revisit the ICC's determination that actual notice to each adjoining landowner that petitioners here seek is not feasible or necessary. See NARPO. As explained in Aband. and Discontinuance, there simply is no practical way to name and locate all of the landowners that might have a reversionary interest in a railroad right-of-way. Moreover, our current procedures -- which facilitate and improve notice to the general public -- ensure extensive notice to the public of proposed abandonments and the possibility that the right-of-way may be used as a trail.

Also, failure to receive actual notice of proposed abandonments does not prejudice any rights landowners may have, because landowners have remedies to obtain just compensation if they can demonstrate in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1429 (a)(1), that a compensable taking of their property has occurred. See Preseault v. ICC, 494 U.S. 1, 4-5 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996); NARPO.

Ms. Marriott contends that the Board's procedures preclude her participation in the trail use negotiation process. But the Trails Act does not grant us discretionary authority to disapprove a voluntary trail use agreement that meets the stated requirements of 16 U.S.C. 1247(d). Iowa Southern R. Co.--Exemption--Abandonment, 5 I.C.C.2d 496, 502-04 (1989) (Iowa Southern), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990) (Goos). Rather, as we and the ICC have repeatedly pointed out, our authority under the Trails Act is ministerial. See id. at 1293-96. We have no involvement in the negotiations between the railroad and the trail use proponent. Nor do we analyze, approve, or set the terms of trail use agreements. In short, when a Trails Act request is made, we ascertain only whether the requirements of the statute have been met, i.e., whether the party wishing to negotiate with the carrier under 16 U.S.C. 1247(d) is willing to assume legal and financial responsibility for management of the right-of-way, and acknowledges that use of the right-of-way as a trail is subject to restoration or reconstruction for railroad purposes. If those requirements are met, and the railroad agrees to negotiate, we issue an appropriate order allowing for the parties' Trails Act negotiations to take place. See T and P Railway--Abandonment Exemption--In Shawnee, Jefferson and Atchison Counties, KS, Docket No. AB-381 (Sub-No. 1X) (STB served Feb. 20, 1997) (T and P), slip. op. at 5-6, rev'd on other grounds sub nom. Becker v. STB, 132 F.3d 60 (D.C. Cir. 1997). The procedures established by the ICC and the Board to meet our obligations under the Trails Act repeatedly have been upheld by the courts. See, e.g., National Wildlife Fed'n v. ICC, 850 F.2d 694, 696-99 (D.C. Cir. 1988); Goos; NARPO.

Contrary to Ms. Marriott's contentions, landowners can and do participate in the Board's abandonment and Trails Act proceedings. Landowners, like any other interested persons, can request to be placed on the list for service of all decisions in a proceeding. Landowners also can seek revocation of a trail condition at any time if they can demonstrate that the statutory conditions are not being met. As we stated in T and P, supra, at 5,

> Specifically, after a Trails Act request is made by a trail group, landowners can submit evidence that a trail offer is a subterfuge (i.e., that the right-of-way will not in fact be used as a trail), or that statutory conditions will not be met (i.e., a trail user lacks funding to meet the financial and liability conditions of the Trails Act).... If a trail use arrangement is successfully negotiated and a landowner or other interested party presents evidence to call into question the continued application of the Trails Act, the [Board] will reopen the abandonment proceeding to afford a trail group the opportunity to show that it continues to meet the financial and liability requirements of the statute. If the [Board] determines that the trail group does not have the ability to meet the financial and liability conditions, the CITU [certificate of interim trail use] or NITU may be revoked and the line declared fully abandoned, at which point the right-of-way would no longer be a part of the national transportation system and any reversionary interests in the property would vest. [Citations omitted.]

Thus, Ms. Marriott is not correct in her belief that landowners have no way of providing the Board with information about allegedly fraudulent activities. Nor has she even attempted to demonstrate that the parties here have engaged in such activities or that they will not satisfy relevant statutory requirements.

Concerns have also been raised regarding the feasibility of a trail on the Browns—Poseyville line right-of-way, maintenance of the property, safety of trail users, and protection of adjoining landowners. We recently discussed these and related issues at length in Idaho Northern & Pacific Railroad Company--Abandonment and Discontinuance Exemption--In Washington and Adams Counties, ID, Docket No. AB-433 (Sub-No. 2X), et al. (STB served Apr. 1, 1998). There, at 10-11, we pointed out that the agency has never become involved in determining the type or level of trail that is appropriate for a specific right-of-way, much less whether use of the right-of-way as a recreational trail is desirable at all. We noted also that the trail user is obligated to use the right-of-way so that it does not become a public nuisance. We emphasized, however, that this is a state or local requirement, not a Board requirement. We pointed out that, in Iowa Southern, at 505, the ICC said,

> We note, however, that a trail use must comply with State

> and local land use plans, zoning ordinances, and public health and safety legislation.... This local regulation can address the Landowners' concerns about such issues as vandalism or noise.... Indeed, the State and local agencies in the area are attuned to the specific interests and needs of their communities.... Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails.

All additional arguments raised by the parties have been considered and found not to warrant individual discussion. In sum, we conclude that petitioners have not established grounds for reconsideration or reopening of our prior decision in this matter; nor have they demonstrated that revocation of the exemption granted in that decision is warranted. Accordingly, the relief petitioners seek will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Margaret Marriott is granted leave to intervene, but the relief she seeks is otherwise denied.

2. The landowners' petition for reconsideration and reopening is accepted for filing, but the relief they seek is otherwise denied.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary